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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-676

W.J. ESTELLE, JR.,

Petitioner,

v.

HARRY LEE WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 500 F.2d 206.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on September 6,

1974, and the Petition for Certiorari was filed in this Court on November 29, 1974. Certiorari was granted on January 27, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), and Section 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District . . . ."

The Fourteenth Amendment provides:

". . . . no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

QUESTIONS PRESENTED

1. Whether the State action requiring Respondent to wear a prison uniform deprived him of due process of law and equal protection of the laws?

2. Whether Defendant's trial in a prison uniform substantially impaired the reliability of the jury's determination of guilt and so fundamentally affected the integrity of the judicial process?

STATEMENT OF THE CASE

Respondent Williams was certified an indigent by the 177th District Court of Harris County, Texas and an attorney was appointed for the trial. However, the lawyer who actually conducted the trial was retained by Respondent. The Respondent has remained incarcerated since his arrest. Respondent was tried before a jury in a prison uniform in the 177th District Court of Harris County, Texas in November, 1970 for assault with intent to murder with malice and was sentenced by the Court on December 9, 1970 to ten years in the penitentiary. The Trial Court appointed present counsel for purpose of appeal. The conviction was appealed by appointed counsel upon the issue of ineffective counsel and the issue of trial in a prison uniform. The conviction was affirmed in an opinion delivered February 9, 1972, styled *Williams v. State*, 477 SW2d 24 (Tex. Crim. 1972), reh. den.

In March, 1972, Respondent filed his Petition for a Writ of Habeas Corpus in The United States District Court for the Southern District of Texas and on October 2, 1973, the District Court denied relief holding that Williams' trial in jail clothing, while inherently prejudicial, was, under the facts presented, harmless error. Williams appealed this decision to The United States Court of Appeals and on September 6, 1974, the Fifth Circuit reversed the ruling of The United States District Court holding that Williams' trial in jail clothing was inherently prejudicial and was not harmless error.

SUMMARY OF ARGUMENT

1. The State of Texas, by and through the Sheriff of Harris County compelled the Respondent to wear his prison uniform by denying his request for his civilian clothes which were at hand. All non-bailed defendants, including Respondent, were tried in prison uniforms.

The record is replete with seeds of reasonable doubt as to Respondent's guilt of assault to murder with malice. In particular, there is strong evidence of provocation, of unequal size of the combatants, and of the absence of malice in Respondent.

Had the Respondent been availed of his right of due process, the jury could have reached a verdict of not guilty, or have found Respondent guilty of assault with intent to murder without malice.

2. The presumption of innocence is a fundamental element in our concept of due process. The great weight of authority holds that a defendant is entitled to be tried with the appearance, dignity, and self-respect of a free and innocent man. It is, therefore, inherently unfair to try a man in his prison uniform. This had been the rule long before the trial of Respondent. It came to be known in 1971 as the Hernandez Rule.

The wearing of a prison uniform is a condition imposed upon the accused by the State for the convenience of law enforcement agencies and correctional departments. A prison uniform is, therefore, a badge of criminality.

Respondent's trial in prison garb before a jury substantially impaired the reliability of the jury's determination of guilt and fundamentally affected the integrity of the judicial process.

Even if this is considered a new constitutional doctrine, it meets the three criteria for according it retrospective application.

ARGUMENT

I.

THE STATE ACTION REQUIRING RESPONDENT TO WEAR A PRISON UNIFORM DEPRIVED HIM OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

The Fourteenth Amendment to the United States Constitution, Section 1, prohibits any State action which abridges the privileges or the immunities of the citizens of the United States, which deprive any person of due process of law or equal protection of the laws. The State of Texas, by and through the Sheriff of Harris County, compelled Respondent and all other persons unable to afford bond to wear a prison uniform during their jury trials. Respondent requested his civilian clothes so that he could avail himself of the advantage of appearing at his trial as an innocent and ordinary citizen. This request was refused by the jailor. (Appendix 72-74.) The prosecutor identified the Respondent's attire at the jury trial as "jail clothing". (Exhibits 35, 42, 87.)

The United States District Court, in its evidentiary hearing, found the records clearly showed there existed the practice in Harris County to try incarcerated defendants in prison uniforms. *Williams v. Beto*, 364 F.

Supp. 335, 343 (S.D. Tex. 1973). Respondent's Exhibit No. 7 shows that every defendant not released on bond who was tried before a jury in the 177th District Court, was tried in a prison uniform. (Exhibit No. 7 was inadvertently omitted from the Exhibits printed in this cause. The Exhibit was admitted into evidence. (Appendix 43.) The United States District Court referred to testimony that "all non-bailed Defendants were tried in jail garb at that time." (*Williams v. Beto*, 338.)

It is not surprising that those defendants who were tried in a prison uniform, were in jail because they were unable to make bond. Those defendants and Respondent were simply poor people. The facts of their poverty and their inevitable trial before a jury in prison garb are inextricably connected.

There is substantial testimony at the evidentiary hearing that if the Respondent's request to wear his civilian clothes had been granted, a different result may have been reached by the jury. Respondent's trial counsel testified that it would have made an impact upon the jury (Appendix 47, 48). He further stated that the Respondent's appearance in a prison uniform could have made an unfavorable impression (Appendix 64). Since Respondent did not take the stand in his trial, his appearance was crucial. Respondent testified at his evidentiary hearing that if his request to wear his civilian clothes which were at hand had been granted, his improved appearance would have created a different impression on the jury (Appendix 74).

The established rule in the Fifth Circuit holds that the trial of an accused dressed in prison clothes infringes upon the fundamental right to the presumption of innocence. This line of authority is found

in nine cases beginning with *Brooks v. Texas*, 381 F.2d 619 (1967); *Hernandez v. Beto*, 443 F.2d 634 (1971); *Garcia v. Beto*, 452 F.2d 655 (1971); *United States v. Fideler*, 457 F.2d 921 (1972); *Goodspeed v. Beto*, 460 F.2d 398 (1972); *Hollins v. Beto*, 467 F.2d 951 (1972); *United States ex rel Stahl v. Henderson* 472 F.2d 556 (1973); and ending with the decision in *Thomas v. Beto*, 474 F.2d 981 (1973). A reading of these cases makes it apparent that the test in the Fifth Circuit is whether the defendant (1) willingly, intelligently, and knowingly waived his right to not be tried in prison garb and, if not, whether the probable impact upon the jury by trying him in prison garb was harmless beyond a reasonable doubt, (2) taking into consideration whether all material facts lead unerringly to defendant's guilt.

Respondent's jury was charged, under the Texas law, as to the offense of assault with intent to murder with malice aforethought and assault with intent to murder without malice aforethought. (Exhibits 8, 9, 15). It is Respondent's position that he suffered actual prejudice constituting a denial of due process when he was compelled to appear before his jury in a prison uniform. Had the Respondent enjoyed the appearance, dignity, and self respect of a free and innocent man, the jury, under the circumstances, may well have found him not guilty or guilty of murder *without* malice.

The most recent Fifth Circuit decision, *Thomas v. Beto* 474 F.2d 981 stated the test to be applied under the particular facts in that case:

> ". . . a jury could have believed the injury, not intoxication, caused the observed symtoms [sic] other than odor. Given this bare possibility, this Court

was unable to conclude that the error of infringing the presumption of innocence by a trial in jail clothing, carried no seed of reasonable doubt as to harm. In Thomas on the other hand, we can perceive no possible inference which clouds or conflicts any essential or material fact. Rather, all such facts lead unerringly to guilt. Thus, our judgment of the probable impact of the prison garb trial on the minds of an average jury differs in the present case." *Thomas*, 983.

The trial record in the case at bar is replete with "seeds of reasonable doubt" as to Respondent's guilt of assault with intent to murder with malice. Respondent was seated quietly talking with his former neighbors when three belligerent people (Neatherlin, Stacy and Tolley) one of which was armed, confronted him with accusations. Respondent was older, weaker and shorter than Neatherlin (Appendix 75) the principal attacker, who falsely accused Respondent of the criminal conduct of giving "hot checks" and further accused him of leaving his apartment filthy and then ordered the Respondent to leave the apartment complex and his friends.

Trial counsel cross-examined a witness, Mrs. Williams, as follows:

"Q. When Mr. Neatherlin walked up to you where you and Mr. Williams and Mrs. Owens were, who was with Mr. Neatherlin at that time, anyone?

A. Well, that lady, I don't know her name, and Bill Stacy, he was with him. (Exhibit 151, 152)."

Trial counsel examined one of the three "confronters", Bill Stacy, as follows:

"Q. You stated that when you left your apartment you took your gun with you, put it behind you, is that correct?

A. That is correct.

Q. Did you know Mr. Williams prior to that time?

A. Never saw him before in my life. (Exhibits 97)

Q. Did you show that pistol at any time prior to then?

A. No, sir, had no reason to.

Q. But it was in the belt of your trousers?

A. Yes sir.

Q. It was not covered by a shirt or anything?

A. No sir, I don't believe I had a shirt on. No sir. (Exhibits 102)

The Prosecutor, on direct, examined the complaining witness, Mr. Neatherlin:

"Q. Now, what first occurred when you and Mrs. Tolley and this Defendant met out there? What was the first thing you said to this Defendant, Mr. Williams?

A. I believe I asked him to pay off his hot checks.

Q. Did he say hello to you to begin with, or was there any words or greetings exchanged?

A. No sir.

Q. Did he say hello to Mrs. Tolley?

A. I believe so." (Exhibits 51)

On cross-examination of Mr. Neatherlin, he stated:

"Q. What disposition have you made of those checks as of this time?

A. Well, this lady paid them off that he came over there to see. Her husband is the one that gave the checks.

Q. Her husband gave the checks?

A. To him and he gave them to my wife for his rent.

Q. Then I gather from your statement he was not the original maker or original signer of that check?

A. No sir. He didn't sign the check. He was smarter than that." (Exhibits 65, 66)

It is clear from the record that the Respondent was not at the scene with any malice towards anyone or with the purpose of causing any breach of the peace. It is also clear that Neatherlin and his two companions were bent on creating a disturbance and making false accusations against the Respondent in front of his friends. The competent testimony at the trial shows that the argument between the parties developed into a shoving match and that the Respondent's knife appeared mid-way through the fight after the Defendant was hit in the face and knocked to the ground.

Upon cross-examination, Mr. Neatherlin testified:

"Q. But could you have been cut there at a later period instead of that first time you said his hand went back?

A. I don't know about that.

Q. But you don't know definitely that he did cut you at that moment?

A. I never did know when he cut me at any moment. I never did feel it.

Q. But after his hand went by your neck you hit him and knocked him down, is that correct?

A. That is correct.

Q. And did you not see a knife at that time, and did you not know you were cut?

A. I never saw the knife at any time.

Q. After you knocked him down he got up?

A. Yes sir.

Q. And you knocked him down again?

A. He got up and run back toward me.

Q. Were you angry when you knocked him down?

A. Yes sir." (Exhibits 62, 63)

"Q. And prior to knocking him down the only thing that he had done as far as moving toward or anything was –

A. Hit me across the neck.

Q. Well, did he hit you or did you say he cut – his arm went back, you said you did not feel anything?

A. Well, I felt it when he hit my neck but I didn't know I was cut.

Q. Whatever happened, it was no pain or no hurt to you at that time?

A. No sir." (Exhibits 64)

There is no direct evidence that the Respondent used the knife the very first blow. Following the first one-handed "push" by the Respondent against Neatherlin, Neatherlin immediately knocked the Respondent down time and time again. Upon cross-examination, Mr. Stacy testified:

"Q. But immediately after this movement Mr. Neatherlin knocks the Defendant down to the ground?

A. That is correct.

Q. And you stated he knocked him down several times?

A. No I didn't state that. I said he knocked him down once.

Q. Did he knock him down several times?

A. Yes he did." (Exhibits 100)

Mr. Neatherlin testified that he knocked the Respondent down about three times. (Exhibits 67) However, another witness, Mrs. Owens, testified:

"Q. How many times did Mr. Neatherlin strike this Defendant? A number of times? Many times?

A. Well, at least five or six. I am not real positive. I didn't count them....

Q. Did you ever see this Defendant knock Mr. Neatherlin down?

A. No. He didn't knock him down." (Exhibits 134)

In view of such testimony, and by applying the Thomas test, there should be no question that a jury could have found that Respondent was guilty of the lesser included offense of assault to murder without malice; or, at least there is a bare possibility or some possible inference that Respondent was possessed of sudden passion such that the Respondent's mind was not sufficiently cool to enable him to know and understand what he was doing and the consequences.

Further, the jury could have had reasonable doubt as to whether the small pocket knife which cut the complaining witness was a "deadly weapon". A pocket knife is not per se a "deadly weapon" under Texas law. *Blount v. State*, 376 S.W.2d 844; *Abels v. State*, 489 S.W.2d 910. Also, the jury could have believed that Neatherlin, the complaining witness, presented an apparent danger to the Respondent on the basis of the testimony that the complaining witness was accompanied by companions, had accused the Respondent of a criminal act. Neatherlin generally acted in a belligerant manner and made the first overt threatening act. *Christesson v. State*, 353 S.W.2d 218; *White v. State*, 354 S.W.2d 158.

It is also important to note that the Texas law fixing the punishment for the crime of which Respondent was convicted has been changed within the past several years. Article 1160 of the Texas Penal Code was amended in 1971 to increase the penalty for assault to murder with malice. However, the Penal Code effective January 1, 1974, reduced the minimum penalty for this crime in Section 22.02 (a).

In summary, the facts of this criminal transaction show that on May 20, 1970, while it was still daylight (Exhibits 120), the Respondent went to visit Kay Tolley in the City of Houston, Texas. While he waited at her apartment for her return, he sat on the porch and talked with the neighbors (Exhibits 123). Ray Neatherlin, Bill Stacy and Kay Tolley approached Respondent. Respondent has previously been a resident of the apartment. Neatherlin demanded Respondent to pay "hot checks" and for unpaid rent and for leaving an apartment dirty. (Exhibits 51, 89). Respondent denied the charges. (Exhibits 52, 132). Respondent was, in fact, not the maker of the checks and the checks had already been paid. (Exhibits 65, 66). Neatherlin was 58 years old (Exhibits 69) and weighed approximately 200 to 215 pounds (Exhibits 65). The Respondent was approximately 64 years of age and was characterized as being of "frail body" (Exhibits 21). A witness stated that Neatherlin was larger, more robust and physically stronger than Respondent. (Exhibits 157). Respondent was dressed in a suit (Exhibits 129) and seated on a porch talking with neighbors awaiting Miss Tolley when Neatherlin, Stacy and Tolley hurriedly arrived to confront the Respondent (Exhibits 83). Neatherlin and Stacy arrived without shirts and Stacy was armed.

(Exhibits 73, 85). Neatherlin told the Respondent to leave the property and a shoving match began. It soon developed into a fight during which Neatherlin discovered he had been cut with a pocket knife and was taken to a hospital and Respondent was thereafter arrested.

Therefore, in terms of the Thomas test, all essential and material facts do not lead unerringly to Respondent's guilt of assault with intent to murder with malice.

REPLY TO PARTICULAR ARGUMENTS OF PETITIONER

Respondent would reply to the Petitioner's argument on page five of his brief where he asserts that jurors "expect a defendant to appear in the courtroom in jail uniform" and that such an appearance is no more prejudicial than the reading of the indictment. Under Texas law, the Court must charge the jury as to the true function of an indictment in order to avoid the natural prejudicial effect of the existance of the indictment. Respondent submits that jurors know very well that the average citizen may post bail. Only under unusual circumstances does the accused remain in jail, especially for as long as the Respondent did in this case. Respondent (in the second half of this brief) cites cases at length in many jurisdictions which condemn the trial of a Defendant in a prison uniform.

Petitioner asserts that there exists no Federal case which had set aside a conviction solely because a

defendant was tried in jail clothes. Petitioner has overlooked *Dennis v. Dees*, 278 F. Supp. 354 (USDC, La 1968). Further, Respondent grounds his entire position upon *Xanthull v. Beto*, 307 F. Supp. 903 (S.D. Tex. 1970) which was specifically overruled as being out of step with the line of authority by *Hernandez v. Beto*, 443 F.2d 634 (5th Cir. 1971).

Respondent urges as persuasive material the statements of three of the twelve jurors in *Scruggs v. Estelle*, No. 74-3180 pending in the Fifth Circuit. We do not know what the other nine jurors believed about the prejudicial effect of trying a defendant in a prison uniform. One of the jurors, Juror Austin (Page 8 of Respondent's Brief), could not identify the Defendant's apparel as being a prison uniform.

In the case at bar, the prosecutor, perhaps as a trial tactic, first made reference to the Respondent's prison uniform (Exhibits 30). At no time did the prosecutor attempt to cure, as to the entire jury panel, the prejudicial effect of the Respondent's appearance in a prison uniform. In each of the two instances in which the prosecutor referred to the Respondent's prison uniform (Exhibits 30, 33), his skilful questions were directed to a single juror (Juror Weaver the first time, and Juror Bell the second) in a compound and multifarious inquiry.

Jurors cannot fully anticipate the impact of a defendant's appearance until all of the evidence has been taken. What a juror says he will consider and what he actually considers at the time of final deliberation are sometimes too very different things. The Respondent did not testify nor did he call any witnesses. His appearance, therefore, became an

important consideration to the jury.

The Respondent also urges this Court to consider the affidavit of an attorney which was admitted as his Exhibit #2 (Exhibits 190). All four of the Petitioner's exhibits were ex parte statements to which the Respondent vigorously objected (Appendix 64, 65, 66). All of Respondent's exhibits (depositions) were available prior to trial for Petitioner's cross-examination. None of Petitioner's exhibits were.

Petitioner asserts at page 20 in his Brief that the record does not support either the United States District Court or the Fifth Circuit conclusion that Respondent was compelled to wear a prison uniform at his trial. The basis for the conclusion that Respondent was compelled is twofold: Respondent's request for his civilian clothes which had been prepared for him was denied (Appendix 73, 74) and secondly, it was a uniform practice to try all non-bailed defendants in their prison uniforms (Appendix 72, 99; Exhibits, Williams' Exhibit No. 7).

The Petitioner states several times in its brief that the trial judge would have allowed the Respondent to be tried in his civilian clothes if he had only requested it. Respondent submits that every shread of evidence to support Petitioner's contention is based upon hindsight and good intentions, especially in view of the stror.g decision handed down in Hernandez. The hard evidence in this case demonstrates that no one knew of the trial judge's good intentions in the face of the universal practice in Harris County to try non-bailed defendants in their prison uniforms.

Respondent's trial counsel testified at the evidentiary hearing that the Respondent's trial in his prison

uniform was not a trial tactic (Appendix 47), he intended to elicit no sympathy (Appendix 47, 68), he intended no waiver of his right (Appendix 48), he considered it a futile objection (Appendix 58, 62), that he was aware of the practice to try non-bailed defendants in a prison uniform (Appendix 49), his previous experience in objecting to prison uniform was futile (Appendix 49, 63), he had been in Judge Love's Court before (Appendix 52), he never saw an objection nor a change out of prison uniform allowed (Appendix 58, 59, 62).

The prosecutor in the Respondent's case admitted that he had experienced jurors who were hostile to those defendants who appeared in a prison uniform (Appendix 85). Such a practice is unfair and should not be tolerated in our judicial process. The Petitioner has assumed the position at p. 22 of his brief that no Courts in the State of Texas any longer tolerate the trial of a defendant in a prison uniform since the Hernandez decision was announced on April 15, 1971.

Petitioner's enlightening statement abundantly demonstrates the salutary effect upon our judicial system of the Hernandez doctrine. Likewise, the announcement by this Honorable Court of such a beneficial doctrine would put an end to the jail garb controversy. The Courts would then be left with only a few pre 1971 jail garb cases.

II.

THE TRIAL OF RESPONDENT IN A PRISON UNIFORM SUBSTANTIALLY IMPAIRED THE RELIABILITY OF THE JURY'S DETERMINATION OF GUILT AND SO FUNDAMENTALLY AFFECTED THE INTEGRITY OF THE JUDICIAL PROCESS.

A. Cases Determined Prior to Respondent's Trial

The presumption of innocence is such a fundamental part of our American judicial system that the courts uniformly have incorporated that right into our concept of due process. *United States v. Thoresen*, 428 F.2d 654, 661 (9th Circuit 1970); *Government of Virgin Islands v. Lake*, 362 F.2d 770, 774 (3rd Circuit 1956); *Dennis v. Dees*, 278 F. Supp. 354 (E.D. La. 1968); *Coffin v. United States*, 156 U.S. 432, 15 S. Ct. 394, 39 L.Ed. 481 (1895); *Hernandez v. Beto*, 443 F.2d 634 (5th Circuit 1971). In Volume 21 Am Jur 2d, Crim. Law, Section 239, we find the following language:

> "Since the defendant, pending and during the trial, is still presumed innocent, he is entitled to be brought before the Court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the Court may otherwise require. He is therefore entitled to wear civilian clothes rather than prison clothing at his trial."

The majority of cases in jurisdictions from coast to coast since 1938, at least, have declared that it was error to try a defendant in a prison uniform before a jury. In *Collins v. State*, 106 P.2d 273, 278 (1940) the Oklahoma Court stated:

> "However apparent the guilt of the defendant might have been, he is still clothed with the presumption of innocence and is entitled upon his trial to wear his civilian clothes."

See also *Shultz v. State*, 179 So. 764 (1934), a Florida decision; *Eaddy v. People*, 174 P.2d 717 (1946), a Colorado decision; *People v. Zapata*, 34 Cal. Rptr. 171 (D.C. App, 1963), cert. den. The Texas Court of Criminal Appeals in January, 1966 declared that the Trial Court was correct in granting the defendant's motion to be tried in civilian clothing, especially in view of the Court's long standing rule which condemned the trial of a defendant in handcuffs, *Clark v. State*, 398 SW.2d 763 (1966). However, the Texas Court of Criminal Appeals in *Xanthull v. State*, 403 SW.2d (1966) found that the defendant failed to show injury or prejudice by his trial in jail clothes.

In 1967 the Fifth Circuit laid down in rather absolute language what is still the policy statement of that Court:

> "It is inherently unfair to try a defendant for a crime while garbed in his jail uniform, especially when his civilian clothing is at hand. No insinuations, indications, or implications suggesting guilt should be displayed before the jury, other than admissible evidence and permissible argument." *Brooks v. Texas*, 381 F.2d 619 (5th Circuit 1967).

Three years later, Xanthull again, unsuccessfully, raised the jail garb issue in the United States District Court, *Xanthull v. Beto*, 307 F. Supp. 903 (S.D. Tex. 1970). The next year, the Fifth Circuit specifically and strongly disapproved the Xanthull decision. The Fifth Circuit reaffirmed the language of Brooks:

"What was inherently unfair in *Brooks v. Texas*, supra, is also inherently unfair in this case. There is little doubt in this Court's mind that negative inferences can be, and more than likely are, created in the minds of the jurors when the accused is brought into Court and tried in prison clothing.

'We conclude that trying Hernandez in his prison clothing infringed a fundamental right – the presumption of innocence." *Hernandez v. Beto*, 443 F.2d 634, 636.

Judge Singleton, who conducted the evidentiary hearing for Hernandez, had found that the evidence of guilt was overwhelming and that the evidence in support of the defense was almost nil, and so trying the defendant in prison garb was harmless error. Said the Fifth Circuit

"The test used by the District Court to determine whether the error was harmless was improper. Before a Federal Constitutional error can be held harmless the Court must be able to declare a belief that it was harmless beyond a reasonable doubt.

'Under the circumstances, we cannot equate the inherent unfairness of being tried in prison garb with harmless error. The probable impact on the jury of Hernandez' appearance in the Courtroom makes it impossible for us to declare a belief that it was harmless beyond a reasonable doubt.'" *Hernandez*, 637

(Perhaps this is an inherent right reserved to the individual by the Ninth Amendment. See Patterson, *Forgotten Ninth Amendment*.)

On Rehearing, the Fifth Circuit added a few comments in order to put the rule into better perspective:

"A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error."

But when the defendant does not object because the Court's practice is to try jail cases in prison garb, the Court stated, "We cannot accept this as a voluntary waiver." *Hernandez*, 637.

In the same year that Brooks was decided, The United States District Court for the Eastern District of Pennsylvania stated that an appearance before a jury in prison garb prejudices a defendant's constitutional right to a fair trial. Further, even a trial before a judge in prison garb could involve constitutional considerations. *United States v. Social Service Department*, 263 F. Supp. 971, 975 (1967).

The next year, The United States District Court for the Eastern District of Louisiana held that the appearance of a defendant before a jury in a prison uniform was the very antithesis of the "garb of innocence" and hence is a deprivation of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. *Dennis v. Dees*, 278 F. Supp. 354, 358 (1968). The same result was reached in *People v. Shaw*, 164 NW.2d 7 (Michigan 1969).

The Texas Court of Criminal Appeals in January of 1970, citing *Brooks*, supra, was careful to state that every effort should be made to avoid trying a defendant in a prison uniform. *Ring v. State*, 450 SW.2d 85, 88. But the case is complicated because the Court found that the defendant plead guilty and failed to show that he was tried in an identifiable prison uniform. In the same year a Pennsylvania Court, citing *Eaddy*, supra, wrote as follows:

> "The presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or the evidence awaiting presentation, every defendant is entitled to be brought before the Court with the appearance, dignity and self-respect of a free and innocent man . . ." *Commonwealth v. Keeler*, 264 A.2d 407, 410 (March, 1970).

About the same time, the Supreme Court of Arkansas in *Miller v. State*, 457 SW.2d 848, reversed a conviction on the principle that absent a waiver, the accused should not be tried in prison garb and that such a rule was in line with the strong majority in the country. (at Page 849).

The only other two cases of which Respondent is cognizant which were handed down prior to the date of Respondent's trial are *McFalls v. Peyton*, 270 F. Supp. 577 (W.D. Va, 1967) and *Wilkinson v. State*, 423 SW.2d 311 (Tex. Crim. App. 1968). The same Court decided *Hall v. Cox*, 324 F. Supp. 786 (W.D. Va, Feb. 1971) which decided McFalls. All three cases are pre-Hernandez (and Wilkinson specifically relied upon Xanthull) and, therefore, cannot be considered to be controlling authority.

B. Cases Decided After Respondent's Trial

The cases in point decided after the trial (November 1970) of Respondent continued to follow the trend of the cases heretofore cited.

The Fifth Circuit's opinion in *Hernandez v. Beto*, 443 F.2d 634, handed down in April of 1971, is clearly the landmark case on the prejudicial effect of the

defendant's appearance before his jury in prison uniform. Respondent has already quoted extensively from that opinion. Subsequent Fifth Circuit decisions were consistent in result with Hernandez. *Garcia v. Beto*, supra; *U.S. v. Fideler*, supra; *Goodspeed v. Beto*, supra; *Hollins v. Beto*, supra; *United States ex rel Stahl v. Henderson*, supra; and *Thomas v. Beto*, supra. In Garcia, the Court found that trial counsel had used defendant's appearance in jail clothes as a trial tactic. Defendant's choice to wear prison garb before the jury to elicit sympathy was a tactic of conscious design. He therefore waived his right to be tried in civilian clothes rather than jail clothes. *Garcia*, 655. The Georgia Supreme Court reached the same result in *Timmons v. State*, 156 SE.2d 68 (1967). There, the defendant agreed to be tried in a prison uniform. He waived what the law had established in his favor. (at p. 69). In *Fideler*, it was shown that there was no identifiable prison uniform used in the Webb County Jail. This fact must, of course, be shown in order to come under the Hernandez rule. In both *Goodspeed* and *Hollins*, the Fifth Circuit was concerned with what constituted a voluntary waiver. The Court found in the latter case, that since it was the Trial Court's practice to try defendants in jail clothing, the trial, even without an objection, did not constitute a voluntary waiver. *Hollins*, 952. In *United States v. Henderson*, the Fifth Circuit Court declared that, while there was no waiver of the error of being tried in prison garb, the facts made it impossible to try the case without relating to the jury that defendant was in prison since the defendant was being tried for the murder of a prison guard. This is the same result as was reached by an

Oklahoma Court in *French v. State*, 416 P.2d 171 (1966). The most recent decision by the Fifth Circuit was *Thomas v. Beto*. The Court characterized the test in terms of whether there was no possible inference which clouds or conflicts any essential or material fact and whether all such facts lead unerringly to guilt. *Thomas*, 983.

Besides the Fifth Circuit, the Tenth, Third and Ninth Circuits have written opinions on the jail garb issue.

The Tenth Circuit in *Watt v. Page*, 452 F.2d 1174 (Tenth Cir., 1972), cert. den. 405 U.S. 1070 (1972), stated that it did not agree with the Fifth Circuit holding in Hernandez to the extent that it appeared to require an automatic reversal if a defendant proved he was tried in jail clothing (at p. 1175). The case was returned to the U.S. District Court for an evidentiary hearing, at which the District Court found the defendant to be prejudiced because he was tried in a prison uniform. The Tenth Circuit Court then affirmed the lower Court's finding of prejudice. *Anderson v. Watt*, 475 F.2d 881 (Tenth Cir. 1973). The same rule was applied the next year in *United States v. Williams*, 498 F.2d 547 (1974). This case and *Garcia v. Beto*, by the Fifth Circuit reach precisely the same result. That there is no real conflict between the Fifth and Tenth Circuits is seen by a careful reading of the explanatory language by the Fifth Circuit when it stated, upon Rehearing, that "a defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." *Hernandez*, 637.

The Third Circuit likewise has accepted the majority view that compelling a defendant to appear before a jury in a prison uniform unconstitutionally infringes his due process right to be presumed innocent until proven

guilty. *Gaito v. Brierly*, 485 F.2d 86 (1973). This holding was reaffirmed in *Lemons v. United States*, 489 F.2d 344 (3rd Cir. 1974).

The Ninth Circuit has denounced the practice of trying a prisoner in jail clothes in stronger terms. In *Bentley v. Crist*, 469 F.2d 854, 856 (1972), the Court criticized the trial judge's finding that trying the accused in jail garb did not amount to a denial of the constitutional right to presumption of innocence, saying "this is contrary to the weight of authority in State and Federal Courts."

Other United States District Courts have recently handed down decisions following the Hernandez rule granting defendants relief upon their showing that they were unwillingly tried in a prison uniform before a jury. *W. W. Smith v. Beto*, (No. 71-H-830 United States District Court for the Southern District of Texas, May 1972); *Bates v. Estelle*, 360 F. Supp. 1278 (SD Tex. July 73); *St. Jules v. Beto*, No. 70-H-840 (S.D. Tex. 1974), (St. Jules' case was also in the 177th District Court of Harris County, Texas, but his trial was before that of Respondent.) *McWilliams v. Estelle*, 378 F. Supp. 1380 (S.D. Tex. 1974).

After the Hernandez rule was announced by the Fifth Circuit, the Texas Court of Criminal Appeals handed down approximately eleven cases on the jail garb point (in chronological order): *Ellis v. State*, 468 SW.2d 406 (June 1971); *Ephraim v. State*, 471 SW.2d 798 (July 1971); *Pratt v. State*, 474 SW.2d 243 (Dec. 1971); *Williams v. State*, 477 SW.2d 24 (Feb. 1972); *Barber v. State*, 477 SW.2d 868 (Mar. 1972); *Simmons v. State*, 480 SW.2d 633 (June 1972); *Prejean v. State*, 480 SW.2d 652 (June 1972); *Ex Parte Slaton*, 484

SW.2d 102 (Sept. 1972); *Ex Parte Kelly*, 484 SW.2d 773 (1972); *Wickware v. State*, 486 SW.2d 801 (Dec. 1972); *Patton v. State*, 489 SW.2d 906 (Feb. 1973).

Ellis, Pratt, Barber, Simmons and *Prejean* follow the same line of reasoning as the older case, *Wilkinson v. State*, supra, and of the Fifth Circuit's decision in *Fideler*, supra, which is to say, that the defendant has the burden of proving he was in fact tried in a prison uniform before he may invoke the Hernandez rule. All of the foregoing Texas cases generally apply the principle as stated in *Brooks v. Texas*, supra, viz., to try a defendant in prison garb infringes upon a fundamental right guaranteed to him by the United States Constitution.

The most recent decision Respondent has located on this issue is *People v. Roman*, No. 14,191 (New York Court of Appeals, Feb. 20, 1975). The New York Court, in reversing the conviction, declared that the defendant was entitled to appear in court with the dignity and self-respect of a free and innocent man, and to require him to appear in convict's attire was to deny him that right. The Court referred to the American Bar Association's Standards which specifically provide that "(a) an incarcerated defendant or witness should not be required to appear in court in the distinctive attire of a prisoner or convict." American Bar Association Project on Minimum Standards for Criminal Justice, *Trial by Jury*, Section 4.1 (b), App. Draft (1968).

The wearing of a prison uniform is a condition imposed upon the accused by the State of which he should be free. The condition is imposed for the convenience of law enforcement agencies and correctional departments of the State. A prison uniform is,

therefore, a badge of criminality. It is common knowledge that jurors are exceptionally responsive to physical variations among defendants and that negative subliminal factors and inferences increase in proportion to the defendant's unattractiveness.*

The unfairness of the situation created by the accused's appearance in a prison uniform is exacerbated because it is most likely brought about by the poverty of the accused. Respondent has proved that all of those defendants who were tried with him in the 177th District Court and who were non-bailed, were tried in their prison uniforms. At the same time, a man of even modest means could make bond, change his attire, and present himself to the jury in the best possible manner. The Respondent's appearance before his jury in a prison uniform, a badge of criminality, substantially impaired the reliability of the jury's determination of his guilt (in particular, the greater offense of assault with intent to murder with malice) and fundamentally affected the integrity of the judicial process.

C. Retrospective Application

After Respondent unsuccessfully prosecuted his direct appeal, he collaterally attacked his conviction upon the same grounds. Nevertheless, this Court should direct that a new trial be given the Respondent for the reason that his trial in a prison uniform before a jury substantially impaired the reliability of the jury's determination of guilt and fundamentally affected the integrity of the judicial process. As the right to be free from fundamentally unfair sentencing pre-dated Pearce,

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*Calven & Zeisel, *The American Jury*, 193,217 (1966).

the right to be free from an imposed badge of criminality, the prison uniform, pre-dated Respondent's trial. (see *Michigan v. Payne*, 412 U.S. 47, 36 L.Ed.2d, 736, 93 S. Ct. 1966 (1973).

Respondent's case meets the three criteria for retroactive application of a new constitutional doctrine as found in *Stovall v. Denno*, 388 U.S. 293 (1967). Those three criteria are: The purpose to be served by the new standards, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of retroactive application of the new standard.

The purpose of the Hernandez rule is to prevent the lessening of the burden of proof required of the State in order to obtain a verdict of guilty. Accused's appearance in a prison uniform throughout the trial is a constant reminder to the jury of all the negative inferences that such an appearance conveys, especially when the accused does not take the witness stand as in the case at bar. The importance of this element in our judicial process has been discussed by this Court on a previous occasion, when it said:

> "The reasonable doubt standard is a 'prime instrument' for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principal whose enforcement lies at the foundation of the administration of our criminal law . . . To this end, the reasonable-doubt standard is indispensible, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Ivan v. City of New York*, 407 U.S. 203, 32 L.Ed.2d 659, 661, 92 S. Ct. 1951 (1972)

This Court, in discussing the retrospective application of the Chimel doctrine, stated: "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impaires its truth – finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." This is so despite reliance by law enforcement officers or severe impact upon the administration of justice. "It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends. In these situations the new doctrine raises no question about the guilt of defendants convicted in prior trials." *Williams v. United States*, 401 U.S. 646, 28 L.Ed.2d 388, 395 (1971).

CONCLUSION

The weight of authority in this country has held it inherently unfair to try a defendant in a prison uniform. For the United States Supreme Court to confirm this fundamental right would not be a clear break with any previous constitutional doctrine. Thus there can be no reliance by law enforcement agencies or by prosecutorial arms of government upon any rule which might now be dissapproved. The Fifth Circuit indicated some desire to apply the Hernandez rule retroactively in *Goodspeed v. Beto*, 460 F.2d 398, 400. This was finally accomplished in *Williams v. Beto*, 500

F.2d 206. United States District Court for the Southern District of Texas accorded retroactive effect to Hernandez in *Smith v. Beto*, No. 71-H-830, May, 1972. The Texas Court of Criminal Appeals did likewise in *Ex Parte Slaton*, 484 SW.2d 102 (1972).

Finally, public policy considerations require this Court to direct that the Respondent obtain a new trial. To apply the Hernandez rule in its fullest bloom retroactively will not have an adverse effect on the administration of justice. The Hernandez doctrine applies to an extremely small percentage of those inmates in penitentiaries. It could only apply to those cases tried before a jury, on a plea of not guilty, with a record complete enough to prove that the defendant was tried *unwillingly* in a prison uniform, and which trial resulted in a guilty verdict, and where not all the material facts lead unerringly to defendant's guilt.

For this Honorable Court to announce such a rule will further prevent the continued abuse of the trials of an indigent in his prison uniform. To reverse this conviction will insure that this particular abuse is forever ended and will further help guarantee the purity of trial by jury in these United States.

For the reasons herein stated, the Judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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